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No. 90-162

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROCKFORD MEMORIAL CORPORATION AND SWEDISHAMERICAN CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CITY OF ROCKFORD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CITY OF ROCKFORD AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Preliminary Statement

The City of Rockford respectfully submits this brief as amicus curiae in support of petitioners, and urges this Court to grant their petition for a writ of certiorari. The written consents of petitioners, Rockford Memorial Corporation and SwedishAmerican Corporation, and of respondent, United States of America, have been obtained and are on file with this Court.

INTEREST OF THE AMICUS CURIAE

The City of Rockford ("Rockford" or "the City") is the second largest city in the State of Illinois with a

population of over 140,000.[1/] The City has a vital interest in the present case because the case decides issues of great importance concerning the quality and cost of medical services available to its citizens.

Rockford has three relatively large hospitals, Rockford Memorial Hospital ("Rockford Memorial"), SwedishAmerican Hospital ("SwedishAmerican") and St. Anthony Medical Center. Each of these hospitals has excess capacity consistent with the downward trend in inpatient utilization. United States v. Rockford

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1/ Located 80 miles northwest of Chicago, Rockford has 800 manufacturing concerns, 75% of which employ fewer than 50 people. Sly, Rockford Frets Fate of Top Employer, Chicago Tribune (October 23, 1988) at 1.

Memorial Corp., 717 F. Supp. 1251, 1294-5 (N.D. Ill. 1988) [2/] Moreover, the hospitals provide and utilize many duplicative services and equipment. Aware of the problems facing hospitals today and, in particular, the need for Rockford's hospitals to remain competitive in a changing health care industry, the City supported the

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2/ The City will not detail the numerous problems which continue to plague the health care industry. Amici American Medical Association and American Hospital Association fully discuss the dramatic increased costs of providing health care, declining levels of reimbursement and reduced demand which have forced many hospitals to close or convert to other uses. Briefs of Amici American Medical Association and American Hospital Association in Support of Petitioners, Rockford Memorial Corp. v. United States, No. 90-162 (U.S. 1990).

proposed merger of Rockford Memorial and SwedishAmerican. The City concluded that the proposed merger was a sound economic decision for the hospitals and would result in numerous benefits for Rockford citizens.

First, the proposed merger would ensure the survivability and continued vitality of two of the city's largest employers.[3/] By eliminating duplicative services, the merger would permit the hospitals to remain financially sound in a shrinking market for health care. See 717 F. Supp. at 1291. Without the efficiencies of a merger,

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3/ Rockford Memorial employs 2,000 people (6th largest in the City) while SwedishAmerican employs 1,800 (8th largest). Sly, supra note 1.

both Rockford Memorial and SwedishAmerican would decline in their abilities to serve the community.

Second, a merger of Rockford Memorial and SwedishAmerican would decrease costs for its patients, since a more efficient hospital would be able to charge less. The rates charged would remain fair because the board members of the new entity represent businesses that must pay for health care.

Finally, a merger would allow Rockford Memorial and SwedishAmerican to compete in the delivery of tertiary care services. It would allow Rockford to retain patients who currently go to Chicago and other cities for

sophisticated care.[4/] Ms. Elaine Breck, manager of oncology services at SwedishAmerican, noted that at present, cancer specialists do not come to Rockford for job interviews because they favor big cities with larger hospitals.[5/] A merger would enable Rockford to attract more patients and physicians and would make Rockford "an even greater city for regional health care."[6/]

4/ U.S. Sues Over Rockford Hospital Merger, Chicago Tribune (June 2, 1988) at 1.

5/ U.S. Fights Merger of Rockford Hospitals, Chicago Tribune (July 12, 1988) at 4.

6/ Former Mayor John McNamara's testimony, p. 855; lines 11, 17-18. United States v. Rockford Memorial Corp., 717 F. Supp. 1251 (N.D. Ill. 1988).

The health care industry is going through rapid changes which will affect the quality of care provided to its consumers. The unique characteristics of this industry need to be considered in any antitrust or injunctive analysis. Because the ability to provide higher quality health care is important in attracting and retaining industry, because the vitality of two of Rockford's largest employers depends upon a merger and because a merger would allow the Rockford hospitals to offer better services more cheaply to its denizens, Rockford respectfully requests that this Court grant the petition for a writ of certiorari to protect the vital interests of Rockford's citizens.

ARGUMENT

I. THE COURT OF APPEALS IGNORED EVIDENCE IN THE RECORD THAT CONSUMERS WOULD BENEFIT FROM THE MERGER AND FOCUSED SOLELY ON A CONCENTRATION ANALYSIS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The court of appeals ignored findings by the district court and evidence throughout the record demonstrating that the merger would benefit consumers. The district court recognized, consistent with petitioners' goals, that the merger would be a great benefit to the Rockford community:

> With regard to the qualitative benefits created by the proposed merger, the court first acknowledges that the idea of a tertiary referral center in Rockford has great appeal. Undoubtedly, the improvement in services would have a positive effect for consumers of health care in the relevant market and economic benefits for the area as a whole.

717 F. Supp. at 1288 (emphasis added). The district court concluded that the merger would lower costs and increase competition, especially in providing tertiary care services:

> Certainly, viewing the proposed merger from the perspective of a purely business decision, the merger makes sense. It would allow the new entity to eliminate certain duplicative services and equipment, with the attendant reduction in personnel and other costs. It would improve the capital position of the new entity, as opposed to the old entities, thus allowing for greater expenditures for equipment and possibly improving the ability of the new entity to buy in larger quantities, reducing some costs. It might also allow the new entity to improve its services to the extent that it might become a major medical center, providing tertiary care in a wider range of services and in a broader geographical area. These are but a few of the business advantages which may inure to the benefit of the defendants if the merger is allowed to proceed. Others may also come to mind.

Id. at 1291. Nevertheless, the district court erroneously concluded that it could not consider such benefits. Id. It, thus, relied solely on market shares.

The court of appeals also failed to consider these benefits and relied solely on market shares. The court of appeals claimed that the district court was "free to reject" the compelling economic benefits which it found in the record. 898 F.2d 1278, 1286 (7th Cir. 1990). The district court, however, did not reject such evidence, but instead claimed that it could not consider such evidence in its antitrust analysis.[7/]

7/ The district court concluded: "If the court's task was motivated by the same business and economic

(footnote continued)

The district court and court of appeals failed to adhere to current antitrust analysis, as dictated by the United States Supreme Court.

A. UNITED STATES v. GENERAL DYNAMICS AND ITS PROGENY MANDATE THE CONSIDERATION OF FACTORS BESIDES CONCENTRATION RATIOS.

In United States v. General Dynamics, 415 U.S. 486, 498 (1974), this Court quoted the language of Brown Shoe Co. v. United States, 370 U.S. 294 (1962), in stating:

7/ (continued footnote)

considerations as those of the defendants, the inquiry could end here." 717 F. Supp. at 1291. The district court felt constrained to consider only market shares without taking into account its findings of important benefits to the hospitals and consumers.

> "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market--its structure, history and probable future--can provide the appropriate setting for judging the probable anticompetitive effect of the merger."

(emphasis added). While the government argued principally through statistics that the acquisition of stock in United Electric Coal Companies by Material Service Corp. and its successor, General Dynamics Corp., was a violation of Section 7 of the Clayton Act, the Court concluded that the district court was justified in finding that other pertinent factors affecting the coal industry mandated a conclusion that no substantial lessening of competition resulted from the acquisition. Id. The Court

reiterated its warning in Brown Shoe that market shares were not conclusive indicators of anticompetitive effects. Id. The government's raw market shares and concentration statistics based on past production did not accurately reflect the likely trend of the industry in the future when the relevant product market was coal, a finite natural resource, and the industry as a whole was declining.

The Court distinguished its holding in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), explaining the results of a declining coal industry. The Court explained that the decreased demand for coal, not the number of acquisitions, had led to a reduction in the number of coal

producers. Id. at 492-3. Thus, the district court in General Dynamics correctly concluded that the litigation before it presented "a very different situation from that in such cases in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), and United States v. Von's Grocery Co., 384 U.S. 270 (1966), where the Supreme Court was concerned with 'preventing even slight increases in concentration...'" Id. at 493, citing 341 F. Supp. at 558 (N.D. Ill. 1972).[8/]

8/ The present situation also provides a very different situation from that in such cases as Philadelphia National Bank and Von's Grocery Co. The reduced demand for inpatient hospital services, not the number of acquisitions, has led to many hospital closures.

Subsequent Supreme Court antitrust cases have followed General Dynamics in repudiating a sole reliance upon statistics. In United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974), the Court ruled that two commercial banks could counter statistical evidence of market concentration by showing that concentration ratios gave an inaccurate account or did not accurately depict the probable effects of the acquisition on competition. Thus, while the government was able to establish a prima facie case based on concentration ratios, the defendants were able to counter that no evidence of the presence of competitive behavior in the regulated market for banking services existed. Id. at 632.

Similarly, in United States v. Citizens & Southern Nat'l. Bank, 422 U.S. 86 (1975), the Court refused to equate the possession of a significant market share with a significant threat to competition. It viewed the evidence refuting the government's statistical proof as clear and strong. First, the government's statistics had a mistaken measurement of the true focus of competition; second, there was a convincing finding that the relevant market never was and never would be competitive because government regulation had sheltered the banking industry from antitrust violations. Id. at 121.

In the present case, the district court's and the court of appeals' sole reliance on market shares resulted in an

incomplete analysis of the effects of this acquisition on competition. The district court considered the level of concentration and concluded that the proposed merger would be inherently likely to lessen competition. 717 F.Supp. at 1291-2. The court of appeals likewise solely relied on concentration analysis to conclude that anti-competitive effects would result from this acquisition. 898 F.2d at 1286. These decisions failed to consider the dynamics of the health care industry which have resulted in numerous hospital closures.[9/] These decisions conflict

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9/ Cleverley, After the Fall: Reasons Behind 1989 Hospital Closings, Healthcare Financial Management

(footnote continued)

with Supreme Court precedent. See Citizens & Southern Natl. Bank, supra; Marine Bancorporation, supra; General Dynamics, supra; Brown Shoe, supra.

B. THE COURT OF APPEALS' RELIANCE ON STATISTICS WAS IN CONFLICT WITH RECENT ANTITRUST DECISIONS IN OTHER CIRCUITS

The decision by the Seventh Circuit also conflicts with decisions in other circuits. For example, in U.S. v. Baker Hughes, Inc., 1990 U.S. App. LEXIS 11233 (D.C. Cir. July 6, 1990), the D.C. Circuit Court held that a merger resulting in a combined market share of

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9/ (continued footnote)

(July 1990) at 22; Total Hospital Closures in the 1980's hit 698, Hospitals (June 20, 1990) at 16; Nemes, "1 in 10 Hospitals Distressed", Modern Healthcare (July 23, 1990) at 3.

76% did not violate Section 7 of the Clayton Act. Noting the misleading nature of the government's statistics, the court of appeals observed that "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness."[10/] Moreover, the court concluded that a "clear" showing that the merger would not reduce competition was not necessary. The defendants only were required to produce "sufficient evidence" that the merger would not have anticompetitive effects.

10/ See Note, Horizontal Mergers after United States v. General Dynamics Corp., 92 Harv. L. Rev. 491, 501 (1978) ("The statistical prima facie case, far from being conclusive, is now merely the starting point for section 7 litigation").

The Baker Hughes court also expounded upon the doctrine established in General Dynamics, supra. It noted that General Dynamics sharply curtailed previous section 7 precedents requiring that a defendant "clearly" disprove anticompetitive effects of a merger. General Dynamics instead required that a merger be "functionally viewed, in the context of its particular industry." 415 U.S. at 498.

Thus, in the context of the hospital industry, the merger of two not-for-profit hospitals will actually generate more competition rather than less if the merged hospital would be able to compete in the market for sophisticated health care. It is likely that the proposed merger would transform Rockford into a

regional health care center which would be a viable competitor to Chicago, Madison, Milwaukee and Rochester hospitals.

The Second and Eighth Circuit Courts of Appeals have also upheld the proposition that while statistics are a part of the analysis of the effects on competition, such statistics are not conclusive. See Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1203 (2d Cir. 1978) (The court considered, in addition to market shares, "reliable data" on the ease of entry into the market and on the trends toward or away from concentration); United States v. Waste Management, Inc., 743 F.2d 976, 982-3 (2d Cir. 1984) (A merger which resulted in a 48.8% share of market was

not illegal because ease of entry into the market made statistics unindicative of company's market power); FTC v. National Tea Co., 603 F.2d 694, 700 (8th Cir. 1979) (The Court considered the "probable future" of the market and discounted the significance of the market share figures). See also United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (Court recognized that "bare market concentration ratios" may not accurately depict the economic characteristics of the market).[11/]

11/ Several authoritative commentators have also expounded upon the General Dynamics "market realities" approach. Professors Areeda & Turner observed in 4 Antitrust Law § 962b at 198-199 (1980) that:

(footnote continued)

The failure of the district court to include in its antitrust analysis the

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11/ (continued footnote)

> The teaching of General Dynamics is that proponents of a merger are entitled to introduce evidence rebutting a prima facie case based on market shares. More specifically, defendants may present evidence indicating that market share figures overstate the competitive significance of the merging firms, and that the shares, when appropriately revised downward, would fall below the threshold of presumptive illegality.

Professor Julian O. von Kalinowski similarly noted that "it [the General Dynamics defense] is a rebuttal, by the defendant of plaintiff's prima facie case based on market statistics. The defendant may show that concentration ratios, "which can be unreliable indicators of actual market behavior did not accurately depict the economic characteristics of the market." 4 von Kalinowski, Antitrust Laws & Trade Regulation 19.03[2] at 19-133 (1989).

numerous findings of economic benefits to the Rockford community and the court of appeals' failure to rectify the district court's misunderstanding mandate reversal of the courts below pursuant to Supreme Court precedent.[12/] The Rockford community would greatly benefit from the proposed merger in light of the dynamics occurring in the health care industry.

12/ Seventh Circuit decisions also followed the General Dynamics "market realities" approach which was not followed in the instant case. Kaiser Aluminum & Chemical Corp. v. FTC, 652 F.2d 1324 (7th Cir. 1981); United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977).

II. THE COURT OF APPEALS FAILED TO WEIGH EVIDENCE OF THE BENEFICIAL EFFECTS OF THE MERGER AS AN ELEMENT OF ITS INJUNCTION ANALYSIS.

The standard for deciding whether a preliminary injunction should be granted are well-known. In Faheem-El v. Klincar, 841 F.2d 712, 716 (7th Cir. 1988), the Seventh Circuit listed four factors:

> (1) whether the plaintiff has a reasonable likelihood of success on the merits; (2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (3) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on defendant; and (4) whether the granting of the preliminary injunction will disserve the public interest. Martin v. Helstad, 699 F.2d 387, 389 (7th Cir. 1983).

In affirming the district court's granting of an injunction, the Seventh Circuit completely ignored the fourth

criteria of its injunction standard, which required the district court to consider the benefits from the merger to the citizens of Rockford.[13/]

13/ Consideration of whether an injunction will disserve the public interest is consistent with a court's required antitrust analysis. This Court has consistently held that the purpose of the antitrust laws is to protect competition, not competitors. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). Thus, courts are required to decide whether the challenged transaction is likely to hurt consumers or the public interest. See Hospital Corp. of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987); U.S. Dept. of Justice Revision of 1982 Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶1.0 (June 4, 1984). Under current antitrust analysis, viewing this proposed merger in the context of the health care market's structure and probable future, consumers and the public interest will benefit from the merger.

First, it is important to note that the financial health of hospitals depends on high occupancy rates.[14/] Both Rockford Memorial Hospital and SwedishAmerican Hospital have suffered from low occupancy rates. See 717 F. Supp at. 1294-5. A merger would allow the hospitals to have a higher rate of occupancy and would thereby reduce costs.

Second, by merging, the two hospitals could eliminate duplicative administrative and equipment costs. The elimination of duplicative costs and the increase in occupancy rates would allow the merged hospitals to charge less to patients.

14/ Dyer, Hospitals Saw Patient Margin Vanish in 1988, Hospitals (May 5, 1989) at 58.

Third, the trustees of the merged hospitals would have every incentive to keep prices from escalating because they are members of local businesses which would be directly affected by hikes in health-care prices.[15/] In fact, the Carilion court noted that:

> as a general rule hospital rates are lower, the fewer the number of hospitals in an area. In addition, charitable, nonprofit hospitals tend to charge lower rates than for-profit hospitals. Relative to other products and services consumers buy,

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15/ The district court in United States v. Carilion Health System, 707 F. Supp. 840, 849 (W.D Va. 1989) stated: "Defendants' board of directors both include business leaders who can be expected to demand that the institutions use the savings achieved through the merger to reduce hospital charges, which are paid in many cases by employers, either directly or through insurance carriers."

hospital services are not price sensitive in a relevant market.[16/]

Fourth, consumers would benefit from the attraction of specialists to Rockford, which would be possible if the hospital were allowed to become a sophisticated regional health-care center able to provide care comparable to hospitals in other midwestern cities. In sum, a merger would improve the quality of health care in Rockford, reduce its costs, and strengthen competition.

16/ See Goldsmith, A Radical Prescription for Hospitals, Harv. Bus. Rev. (May/June 1989) at 111.

CONCLUSION

The court of appeals failed to consider, as a part of either its antitrust or injunction analysis, the beneficial effects of the merger by solely relying on a concentration analysis which conflicted with recent decisions of this Court and other courts of appeals. For these reasons, the Court should grant the Petition for a Writ of Certiorari.

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